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IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,  
R.S.O. 1970, c. 318, as amended,

AND IN THE MATTER OF the complaint of Mr. Nadim  
Altaf Malik against Her Majesty the Queen in  
Right of Ontario acting through Her servants and  
agents in the Ministry of Government Services,  
and the following servants or agents personally,  
John Noble Turkington, Christine Deault and  
D'Arcy Counsell.



BOARD OF INQUIRY

MARY A. EBERTS

APPEARANCES

S.L. GOLDENBERG, ESQ. - Counsel for the Ontario Human  
Rights Commission and the Complainant

C. RIGGS, ESQ. - Counsel for the Respondents



Mr. Malik complains that the Respondents are in breach of section 4(1)(b)(c) and (g) of The Human Rights Code, R.S.O. 1970, as amended. The sections provide:

4. (1) No person shall,

(b) dismiss or refuse to employ or to  
continue to employ any person;

(c) refuse to train, promote or transfer  
an employee;

(g) discriminate against any employee  
with regard to any term or condition  
of employment

because of race, creed, colour, age, sex,  
marital status, nationality, ancestry, or  
place of origin of such person or employee.

He states in his complaint, submitted on March 1, 1978 to the Ontario Human Rights Commission, that he was offended against because of his race, colour, ancestry or place of origin.

Mr. Malik's complaint arose when he was unsuccessful in a competition for a permanent job of Clerk Supply 2 within the Ministry of Government Services. The Ministry was the original respondent in Mr. Malik's complaint; at the opening of the hearing before this Board, on October 31, 1979, the individual respondents were added on consent. They are, or were at the material time, employees of the Ministry.

Mr. Malik laid a complaint with the Human Rights Commission on March 1, 1978. Attempts at conciliation were unsuccessful, and this Board of Inquiry was appointed. Hearings were held on October 31, 1979 and January 22, 1980.

Mr. Malik began employment with the Ministry of Government Services, on a contract basis, in September 1974. He worked as a supply clerk, picking out, packing and shipping orders in the warehouse of the Ontario Government Bookstore. The availability of nine permanent "Clerk Supply 2" jobs was advertised among the warehouse staff by way of a memo from the Warehouse Manager, J. N



Turkington dated February 15, 1978. Of these nine jobs, one was to perform the duties of a shipper/receiver and the other eight were to perform the duties of supply clerk. Twelve employees, all on contract or working as "GO-temp" workers, submitted applications by the required date of February 21. All were interviewed on February 27, 1978, in turn, by a panel composed of D'Arcy Counsell, Manager of the Publications Service, Noble Turkington, Supervisor of the Publications Warehouse and Christine Deault a recruitment officer in the personnel branch of the Ministry. Noble Turkington was the immediate supervisor of the twelve applicants; he reported to D'Arcy Counsell.

The three interviewers sat informally together in the cafeteria of the warehouse building and candidates were heard one by one, with no other candidates present. Each person was seen for fifteen to twenty minutes and asked roughly the same questions as the others. The questions were agreed upon in advance of the interview by the three presiding. The only variation from one candidate to another occurred if supplementary questions were needed to clarify his answers or explain the main questions to him.

The main questions posed by the interview team were outlined by Mrs. Deault. They were: 1) describe the important aspects of the position you seek; 2) what is the expectation of an employer and an employee in a hiring situation? 3) what are your career goals? 4) how many times are you late in a month? 5) what is your attitude to your coffee break and extended lunches? 6) do you have any suggestions for improvement in the way the job is done?

The Request for Staff (Ex. 33) for the Supply Clerk position gave the following details of the job:

Duties New Employee Will be Required to Perform

- To select orders for publications from the shelves & wrap & mail same after indicating method of mailing and affixing appropriate stamps, labels, stickers, etc.
- To stack shelves with publications
- To move skids about in the skid area
- To load and unload trucks manually
- To occasionally clean shelves
- To do any other job normally expected of a stock room clerk





### Experience Desired

- Two years stockroom experience (minimum)

### Classifications Desired

- A thorough knowledge of Ontario Government Publications a must
- Some knowledge of Federal Government Publications helpful

-A COMPETITION TO BE HELD FOR THIS POSITION-

At the end of the interviews, the three interviewers reached a consensus about what rating each candidate should receive, given their answers to these questions and the standards set by the Skilled Trades Rating Manual. The applicable page of the manual was submitted as Exhibit 38a and is reproduced below:

#### SKILLED TRADES RATING MANUAL

Minimum acceptable score.....

Ex. 38a

| 1. EDUCATION   | 2. EXPERIENCE  | 3. VALUE OF KNOWLEDGE<br>RELATED TO POSITION   | 4. EXPRESSION  |
|--|--|--|--|
| Academic and trade training<br>exceed all requirements<br>48               | Lengthy, progressive and<br>varied experience in trade<br>plus wide experience in<br>related fields<br>138 | Extensive knowledge of<br>trade and related fields.<br>Aware of new developments<br>and techniques<br>96 | Able to analyse and discuss<br>variety of subjects. Able to<br>communicate with non-<br>trades people. Able to<br>write clear, concise work<br>reports<br>60 |
| Additional trade or skill<br>training closely related to<br>field<br>38    | Many years' varied trade<br>experience plus significant<br>experience in related work<br>115               | Above average knowledge<br>of own trade and related<br>fields<br>76                                      | Gave clear concise replies.<br>Probably able to write<br>satisfactory reports<br>48  |
| As required<br>28  | More than required<br>experience in trade plus<br>experience in related<br>work<br>92                      | Meets requirement for<br>position<br>56  | Acceptable replies to<br>questions. Seems to under-<br>stand what information is<br>required in written report.<br>35  |
| Minimum acceptable education<br>combined with suitable<br>experience<br>18 | Minimum experience in<br>trade plus experience in<br>related work<br>69                                    | Appears to be weak<br>in some areas required<br>for position<br>36                                       | Frequently unable to<br>explain work methods or<br>procedures. Probably un-<br>able to produce a mean-<br>ingful written work<br>report<br>23                |
| 8  | Could obtain required work<br>experience within one year<br>46   | Newly certified, only<br>apprenticeship<br>experience<br>16  | Diction so poor or accent<br>so bad it was difficult to<br>understand what was said<br>10  |
|  | Limited or apprentice<br>experience<br>23  |  |  |



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Ex. 38a

| 5. INITIATIVE  | 6. RELIABILITY   | 7. PHYSICAL SUITABILITY   | 8. PERSONAL CHARACTERISTICS  |
|--|--|---|--|
| <p>Seems able to devise solutions to unexpected job problems. Likely to voluntarily complete additional tasks, and rearrange work sequence for greatest efficiency 78</p> <p>Appears willing to undertake additional tasks and likely to recommend areas where other work is required, most efficient methods or sequence, etc. 56</p> <p>Probably would report conditions where need for work is obvious. Unlikely to undertake additional tasks unless instructed 35</p> <p>Probably would do assigned work only. Unlikely to look for or report on additional requirements 13</p> | <p>Appears able and willing to plan work details and follow through all steps to complete assigned tasks. 60</p> <p>Appears able and willing to plan own schedule to make best use of time, tools, materials, transport, etc. to complete jobs with little or no need for supervision 48</p> <p>Appears able to do routine work with minimum supervision 35</p> <p>Appears unable to solve minor job problems without frequent instructions from supervisor 23</p> <p>Appears to require continuous close supervision 10</p> | <p>Physically fit for all requirements of position 60</p> <p>Slight physical shortcoming for position. May require medical evidence 35</p> <p>Does not appear physically capable. May require medical evidence 10</p> | <p>Quietly confident. Showed enthusiasm and interest in work. Proud of skill 60</p> <p>Co-operates, friendly, helpful attitude 50</p> <p>Not unpleasant but not forceful or attractive 40</p> <p>Nervous, agitated. Excessively talkative 30</p> <p>Tactless, overbearing or rude. Critical of past employers 20</p> <p>Appeared to be unco-operative in interview. Evaded or ignored questions 10</p> |



Mr. Malik received the second lowest rating; the scores were as follows:

|                       |   |             |
|-----------------------|---|-------------|
| Top ranking candidate |   | 478         |
| 2nd                   | " | 433         |
| 3rd                   | " | 425         |
| 4th                   | " | 425         |
| 5th                   | " | 425         |
| 6th                   | " | 404         |
| 7th                   | " | 392         |
| 8th                   | " | 389         |
| 9th                   | " | 381         |
| 10th                  | " | 381         |
| 11th                  | " | 344 (Malik) |
| 12th                  | " | 313         |

The top ranked candidate received the shipper/receiver job. The candidates ranked 2 through 9 received the supply clerk jobs, with the tie between number 9 and number 10 being resolved in number 9's favour because of his war service.

Mr. Malik had expected to be given a permanent position. He had more on-the-job experience at the Publications Warehouse than the other candidates, had introduced most of the others to the requirements of the job when they began work and had never had any complaints about his work. Not being hired hurt Mr. Malik very deeply. His employment terminated, with the end of his last short-term contract, on March 31, 1978.

A letter from J. N. Turkington explaining why he did not get the position (Ex. 10) explained:

The reason you were not selected was that since all applicants including yourself had on-the-job experience the competition was very close and you were edged out not because you were a bad overall worker (there were no really bad workers at the interview) but mainly because you had no strong points in your favor and you did not present yourself as well for the interview as the other, also latenesses, extended lunches and coffee breaks were a detrimental factor.



Mr. Malik and the Human Rights Commission contended before the Board that the interview procedure discriminated against Mr. Malik. They did not say that there was any conscious intent to discriminate. Rather it was argued that reliance on an interview as the sole method of allocating the permanent jobs constituted "indirect" discrimination against the complainant. The interview may have been essentially the same for all candidates, but because of Mr. Malik's ethnic background he performed badly in that setting. He didn't get a chance to have his real capacity for the job evaluated, and was, therefore, wrongly refused a permanent position.

It was submitted on behalf of counsel for the Ministry that the concept of "indirect" discrimination cannot be used in cases decided under The Ontario Human Rights Code. I am satisfied that the language of the Code does not preclude the use of this concept. Although section 4(1) of the Code does not forbid actions that directly or indirectly have the prohibited consequences, as do other sections and subsections of Part I, the language of the section does not require that the offense be direct, in any sense of that word. Importantly, the Supreme Court of Alberta has held that intent need not be shown in order to succeed in an offense under legislation like The Ontario Human Rights Code: see Re Attorney General for Alberta and Gares et al. (1976), 67 D.L.R. (3d) 635. This means that the effect of conduct, as well as its design, can be the measure of its acceptability under The Code, and it is effect of conduct that figures largely in determining what is indirect discrimination. It may be noted that the concept of "indirect discrimination" was explored, and applied, by a Board of Inquiry under The Code in Singh v. S.I.S. (Cumming, May 31, 1977), a case finding an employer's requirement to wear a certain type of uniform and cap contrary to the Code because of its indirect, adverse effect on the employment of Sikhs, whose religion requires the wearing of a turban.

It is necessary, however, to explore what is involved in an argument of "indirect" discrimination, so that its appropriateness and cogency in Mr. Malik's case can be assessed.





The idea of "indirect" or "impact" discrimination was established in American jurisprudence under Title VII of the Civil Rights Act 1964 by the cases of Griggs v. Duke Power Co., 401 U.S. 424 (1974) and Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). These cases dealt with black workers; the Supreme Court decision in Dothard v. Rawlinson, 97 S.Ct. 2720 (1977) applied the same reasoning in a case of alleged sex discrimination.

The starting point is a requirement for employment that seems to be neutral, like, for example, a requirement that certain skill or intelligence tests be passed, that a certain level or proficiency in English be demonstrated, that the employee be above a certain minimum height or weight, or able to wear a certain kind of uniform cap. The requirement that all candidates perform at a certain level in an oral interview would be such a "facially neutral" requirement. Nothing on the surface shows a discriminatory purpose or content, because the requirement is applied equally to all.

Yet, a disappointed applicant may argue that this deceptively neutral requirement actually has a disproportionately negative impact on members of a particular group. In Dothard, for example, more women than men were disadvantaged by a minimum height and weight requirement for prison guards. In Singh v. S.I.S., Sikhs as a group were proportionately more disadvantaged in obtaining employment with a security guard company because of its requirement to wear a cap.

It is up to the complainant to show that the requirement in question has a disproportionate impact on members of the group to which he belongs. That group must, to be sure, be one that is protected by the Human Rights Code. Once the complainant has established the disproportionate impact on his group of a seemingly neutral requirement, the burden shifts to the employer to show that use of the offending test or criterion is a business necessity. The employer must show that certain employee traits are necessary for, say, greater efficiency or safety and also that the impugned practice or criterion is actually successful in measuring or



predicting these qualities. If the employer succeeds at that, then the employee may still show that other selection devices without similar discriminatory effect would also serve the employers legitimate business interests.

Thus, once disproportionate impact is established, the employer must show not only that the impugned device produces employees with the job related qualities required, but that it is the only way of selecting such employees.

The Commission has sought to apply the foregoing approach to the interview used by the Ministry to choose persons for the permanent Clerk 2 Supply jobs. It argues that the interview format, and this interview format in particular, has a discriminatory impact on Mr. Malik and persons like him because of their ethnic background. Mr. Malik came from Pakistan in 1970 at the age of 23. He is a Muslim, and very traditional in his outlook, as exemplified in the Commission's submission by the fact that his wife was chosen for him by his mother. His family speaks Urdu and Punjabi at home, although he learned and spoke English at school, and later at work. He secured a Grade 12 education in Pakistan.

The Commission did not bring any statistical evidence to show that job interviews in the Ministry of Government Services have over time resulted in a disproportionately high rate of rejection for people of traditional Muslim and Pakistani backgrounds. Nor did it rely heavily on any statistical analysis of the results of this particular interview, although Mr. Malik stated in his testimony that the twelfth-ranked applicant was very similar in background to himself, and they both believed there had been discrimination.

The Commission's case focussed in part on Mr. Malik's low scores in four of the areas on the Skilled Trades Rating Manual scale: expression, initiative, reliability and personal characteristics. He argued that because of Mr. Malik's background he would score unfairly low in these areas in an interview, and that these elements of the score should be disregarded. He





asked that a comparison be made between the scores of Mr. Malik and the successful 9th ranked candidate. Were the offending elements of the scores to be deleted from both, he argued, Mr. Malik would come out ahead. As there was some controversy about the "reliability" factor, he argued that even with Malik's lower reliability rating left in, he would emerge ahead of the successful candidate and should have had the job.

The scores in question were:

|                           | Malik<br><u>          </u> | Ninth ranked<br><u>successful candidate</u> |
|---------------------------|----------------------------|---|
| Education                 | 28                         | 28  |
| Experience                | 92                         | 69  |
| Related Knowledge         | 56                         | 56  |
| *Expression               | 23                         | 48  |
| *Initiative               | 35                         | 35  |
| *Reliability              | 10                         | 35  |
| Physical Suitability      | 60                         | 60  |
| *Personal Characteristics | <u>40</u>                  | <u>50</u>                                   |
|                           | 344                        | 381   |

The reason for submitting that the three or four elements of the scores be deleted was that here, in particular, Mr. Malik's ethnic background would render him seriously disadvantaged by this apparently neutral test. Omitting the four starred categories from both scores would produce scores of 236 for Mr. Malik and 213 for the other candidate.

The Commission relied to establish this branch of its argument on the testimony of Dr. Frances Henry, since 1973 a full professor of anthropology at York University particularly interested in studying black and East Asian communities in Canada.

Dr. Henry testified that Mr. Malik's area of the world has one of the most rigidly stratified methods of organization of any of the societies anthropologists know about. Where an interview was being conducted by individuals occupying authority roles, like Mr. Counsell and Mr. Turkington, an individual of Mr. Malik's



background would assume a very deferential, non-assertive, low key approach. The assessment procedure would make him feel his inferior and subordinate position and react accordingly. In a work environment, the person of Mr. Malik's ethnic and cultural background thinks that by being non-assertive and simply doing his small job without anything further, he would demonstrate his loyalty to his superior. In exchange for that loyalty, he would expect to be cared for and protected.

Mr. Malik's expectation that he would receive a permanent job for his long service has been referred to. He stated he went into the interview expecting it to be something of a formality, and was upset by some of the questions which seemed to him to be too personal. Particularly offensive were queries about his night studies in electronics technology and his career goals within the civil service. In this connection, Dr. Henry testified that persons of Mr. Malik's cultural background can be very rigid and unable to "roll with the punches." If one's expectations of the interview were not met, she stated "I think he would be at sea, would fall apart, probably in very demonstrable ways."

Certainly, this hypothesis about behaviour from Mr. Malik's cultural group accords with some of the reactions the interviewers noted and scored adversely. He was said to "present himself" badly, not come forward with suggestions for improving work methods, to speak indistinctly, to have bad posture. One of his responses was particularly damaging to him. When asked if he would take the initiative to return to work upon noticing that he and a group had stayed too long at a coffee break, he replied that he would wait for the group to move. Both his reliability and initiative marks suffered for this reply.

We must also take into account Dr. Henry's further observations. Two of the successful candidates, placed at fourth and fifth place respectively, were also of East Asian origin. One, a Hindu, had been raised and educated in Kenya, later pursuing studies to the Masters' Degree level at two Indian universities.





The second, a Christian, had been born and raised in Georgetown, Guyana, attaining a Grade 12 education there. Both stated that they would call themselves East Asian in origin, as was Mr. Malik. The success of these two candidates raised the question of the extent to which Mr. Malik's low performance in the interview was related to his own personality and characteristics, as distinct from cultural background. While stipulating that an East Asian person's reaction to the interview might vary depending on the degree of modernization or Westernization in his or her upbringing, Dr. Henry stated, at p. 482 of the transcript:

"...while I would have to admit as you suggest that obviously there is room for individual difference, and not every individual Pakistani would react in quite that way, clearly on the other hand the tightness, the intensity, the rigidity of that stratification system, and what it involves for the individual, for the personality if you will, is so strong that in this kind of culture/personality interaction I would give an awful lot of weight to the cultural aspects."

Dr. Henry also stated on cross-examination that there is no statistical evidence available, to her knowledge, to the effect that in Canada Pakistanis who participate in interviews of this kind, particularly the kind of interview established and run by the Ontario government, will in fact do proportionately worse than other groups. She also stated that to her knowledge there is no statistical evidence to demonstrate any distinctions in interview performance between different groups of East Asians.

What the Commission's submission amounts to is an assertion that the interview method here used would fall disproportionately severely on persons of very traditional Muslim/Pakistani upbringing. It offers expert testimony, but no statistics, to back up the argument.

In the first place, it must be borne in mind what has to be shown by a plaintiff seeking to establish "indirect" or "impact" discrimination in a facially neutral requirement. In Dothard v. Rawlinson, 97 S.Ct. 2720 (1977), Mr. Justice Stewart observes at pp. 2726-7 that the Griggs and Albermarle cases



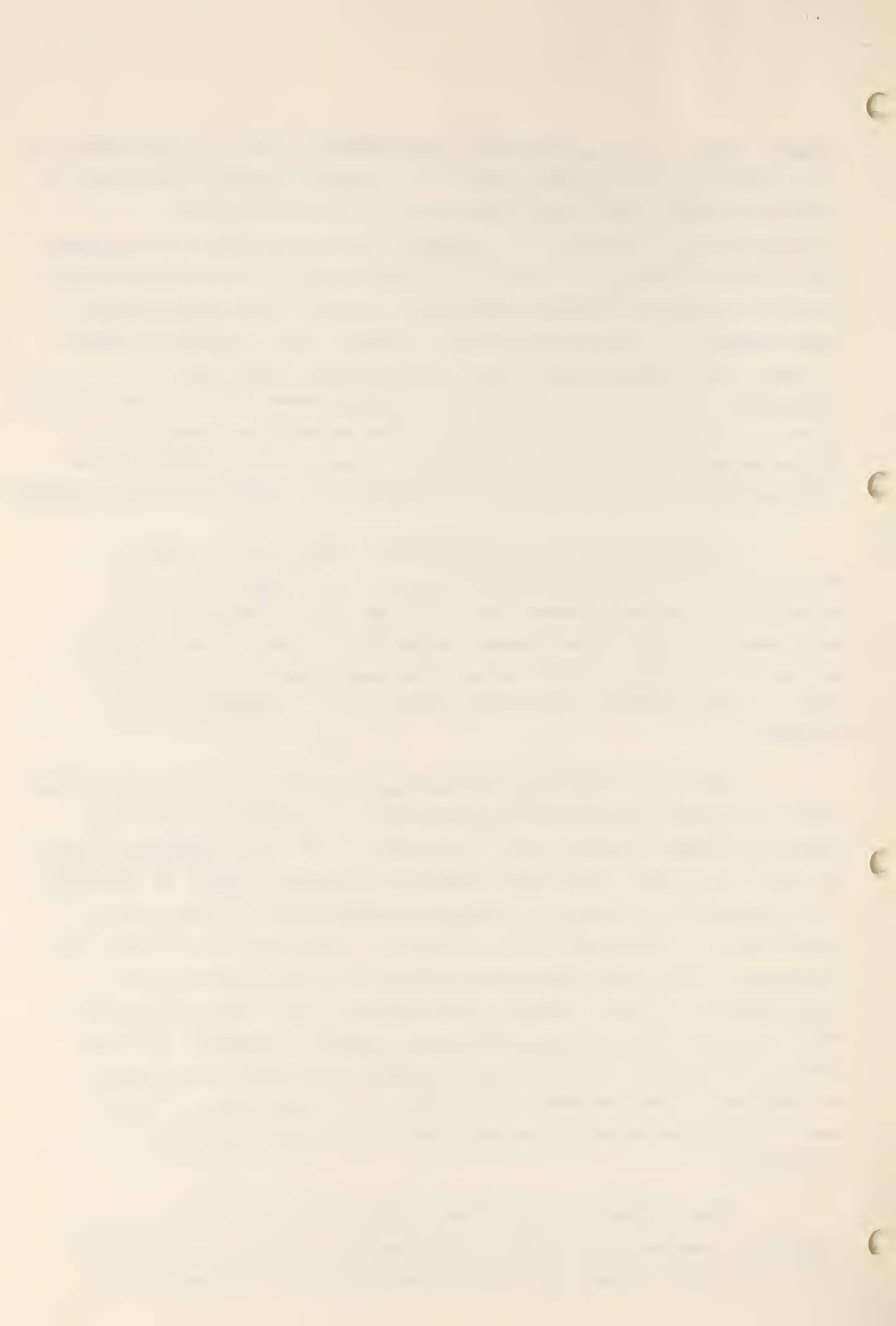


require that "...to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." In Dothard, the plaintiff used national census data to show the relative proportions of men and women who would be excluded from employment as guards by minimum height requirements in the Alabama prison system. Mr. Justice Stewart at page 2727 accepted the use of generalized national statistics, stating that there is no requirement that a statistical showing of disproportionate impact must always be based on characteristics of actual applicants. He did not consider the acceptability of other kinds of evidence of disproportionate impact.

In some cases, the requirement itself will permit a presumption of disproportionate impact to be made. In this category is the requirement of a cap or other headgear, or a requirement to be clean shaven, which will always, for example, exclude all Orthodox Sikh males from employment. Mr. Malik's case is not, however, one where this sort of assumption can be made.

The Equal Employment Opportunity Commission in the United States has had considerable experience in assessing claims of disproportionate impact under Title VII. In its Compliance Manual (§ 135.2, p. 3146), the EEOC assesses different types of evidence it is prepared to accept to show disproportionate impact of a requirement. Although various kinds of statistical evidence are preferred, The Commission does endorse the acceptability of sociological studies, expert testimony and "any other evidence" which tends to show disproportionate impact. Counsel for the Commission argued that we should accept Dr. Henry's testimony as long as it was relevant and probative, applying to it the same touchstone as would be applied to any other type of testimony.

The argument of "indirect discrimination" is a relatively new one in Canada. Obviously, keepers of statistics like Statistics Canada and others are unlikely to have set up



their data gathering mechanisms to accomodate proof of indirect discrimination claims. Collating or analysing data on a case-by-case basis for individual complaints may require vast amounts of time and money, even assuming that the raw information had ever been collected. In some cases of indirect discrimination, we may well find that prohibitions against soliciting in employment applications information about race, national origin or religion, contained in Human Rights Codes themselves, militate against collection of meaningful data on the hidden effects of neutral requirements.

In the circumstances, it would not be helpful or realistic to impose a flat bar against the use, in a proper case, of expert opinion evidence to establish the disproportionate impact of a particular requirement. However, it must be remembered that that evidence must still enable the plaintiff to make out a prima facie case of disproportionate impact on the members of a protected group. Even Mr. Justice Stewart in Dothard stated that there was no need for the plaintiff to exhaust every possible source of evidence if the evidence presented "on its face actually demonstrates" a requirement's disproportionate impact: p. 2727 (emphasis supplied)

It is, to my mind, doubtful whether Dr. Henry's evidence, even in conjunction with other testimony before the Board, establishes the disproportionate impact of this interview on persons of Mr. Malik's origin and culture. Although what she said was not inconsistent with what happened, it was not necessarily consistent with all that happened here. For example, two other East Asians, one with a Grade Twelve education like Mr. Malik, scored highly. We heard little evidence touching upon the twelfth rated candidate, said to be more similar to Mr. Malik in culture, religion and origin. However, one thing that did come out in the evidence was that this man's experience at the warehouse was as a typist, not a supply clerk. The letter informing him that he did not place in the competition emphasized this difference in background between himself and all the other candidates. From a review of the application forms submitted in evidence, it is apparent that this is so. It is difficult to use evidence of a "group" experience at this particular interview to establish its disproportionate impact.





This makes it difficult to say that the interview method fell disproportionately severely upon members of a protected group, or, in the words of Mr. Justice Stewart, that the method selects applicants for hire in a significantly discriminatory pattern.

Although the Commission tried to deal somewhat generally, through Dr. Henry's evidence, what its submission really amounted to was that Mr. Malik was a group of one - with certain characteristics - and that the interview method was unfairly hard on this group. One must show something more than this in order to show indirect discrimination arising from a superficially neutral requirement.

There is an added difficulty. The suggestion was really that Mr. Malik's culture and upbringing made him poorly suited to perform well in an interview, even though his actual work performance was good. By suggesting that the interview result be invalidated because of its negative cultural implications, counsel for the Commission is indirectly asking that the employer be told to design its selection mechanism in a way that would be sensitive to the strengths and weaknesses of applicants. These would be strengths and weaknesses, mind you, arising from or connected with race, creed, colour, nationality, ancestry or place of origin, for the Code does not prohibit employer insensitivity to weaknesses stemming from other causes, like poverty or unstable family background. Yet, the Code itself states in section 4(4):

No person shall use or circulate any form of application for employment or make any written or oral inquiry...that requires an applicant for employment to furnish any information concerning race, creed, colour, nationality, ancestry or place of origin.

How the employer is to insure a sufficient degree of evenhandedness, given the inability to ascertain this information, was not elaborated upon. Similarly, even if he or she knew the exact composition of the applicant pool, it would be necessary to have in addition sensitive and accurate information about the strengths and weaknesses of each culture. How to prevent the intrusion of stereotype and assumption, and how to ensure that the selection mechanism is fair for each, differently composed, applicant pool without being prohibitively



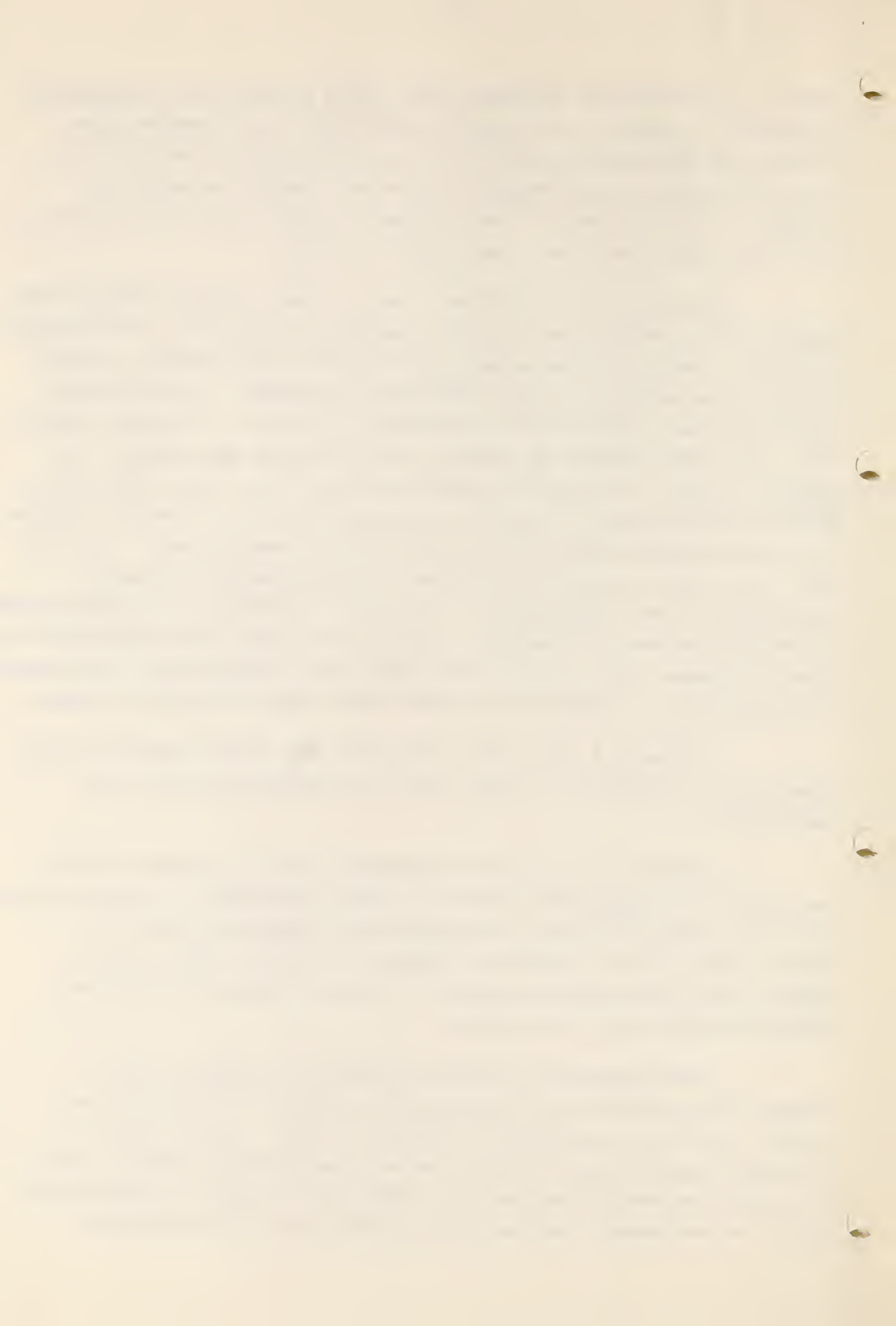
costly, are additional problems upon which we were not enlightened by counsel. Lastly, it is surely inevitable that someone whose culture and upbringing made him or her particularly suited to the interview format could complain if he were denied access to it because of the accident of the cultural composition of the group of his fellow applicants on a particular occasion.

One can say, of course, that too much concern about these issues in Mr. Malik's case is just needless resort to a "floodgates" argument. Yet this case raises all too well the problems lurking close to the surface of the Commission's argument. The "indirect discrimination" approach was developed in the U.S. in cases dealing with very broad groups of persons, first blacks then women. In Singh v. S.I.S., its use in Ontario was begun in a case involving a broad grouping where it could be assumed that all, or most, members of a well-defined group would be hurt by the requirement. In this case, the group is very ill-defined; its boundaries depend on intangibles like "upbringing," "culture," the degree of modernization or Westernization in a person's country of origin, and the length of time in Canada. All in all, the policy and factual basis for acceding to an argument of indirect discrimination here is just too remote.

Although I make this finding on the first branch of the Commission's submission, there remain two other matters to be considered.

Firstly, it will be remembered that an employer whose selection device has been shown to effect adversely a disproportionate part of a protected group can justify the impugned device by showing that it is a business necessity, and that there are no other, less discriminatory ways of choosing employees with the characteristics he or she needs.

The Commission led the evidence of Professor Paul Stager, York University, concerning the merits of the interview itself. He is an Associate Professor at York, specializing in industrial psychology, and has had wide experience designing and evaluating selection devices for industry, military and government jobs. He evaluated the interview on the basis of information





supplied by the Commission: a copy of the scoring instructions used by interviewers, a summary of the scores obtained by the applicants, the job description for Clerk 2 Supply and a copy of the Civil Service staffing standards manual containing a description of the prerequisite for the Clerk 2 Supply job.

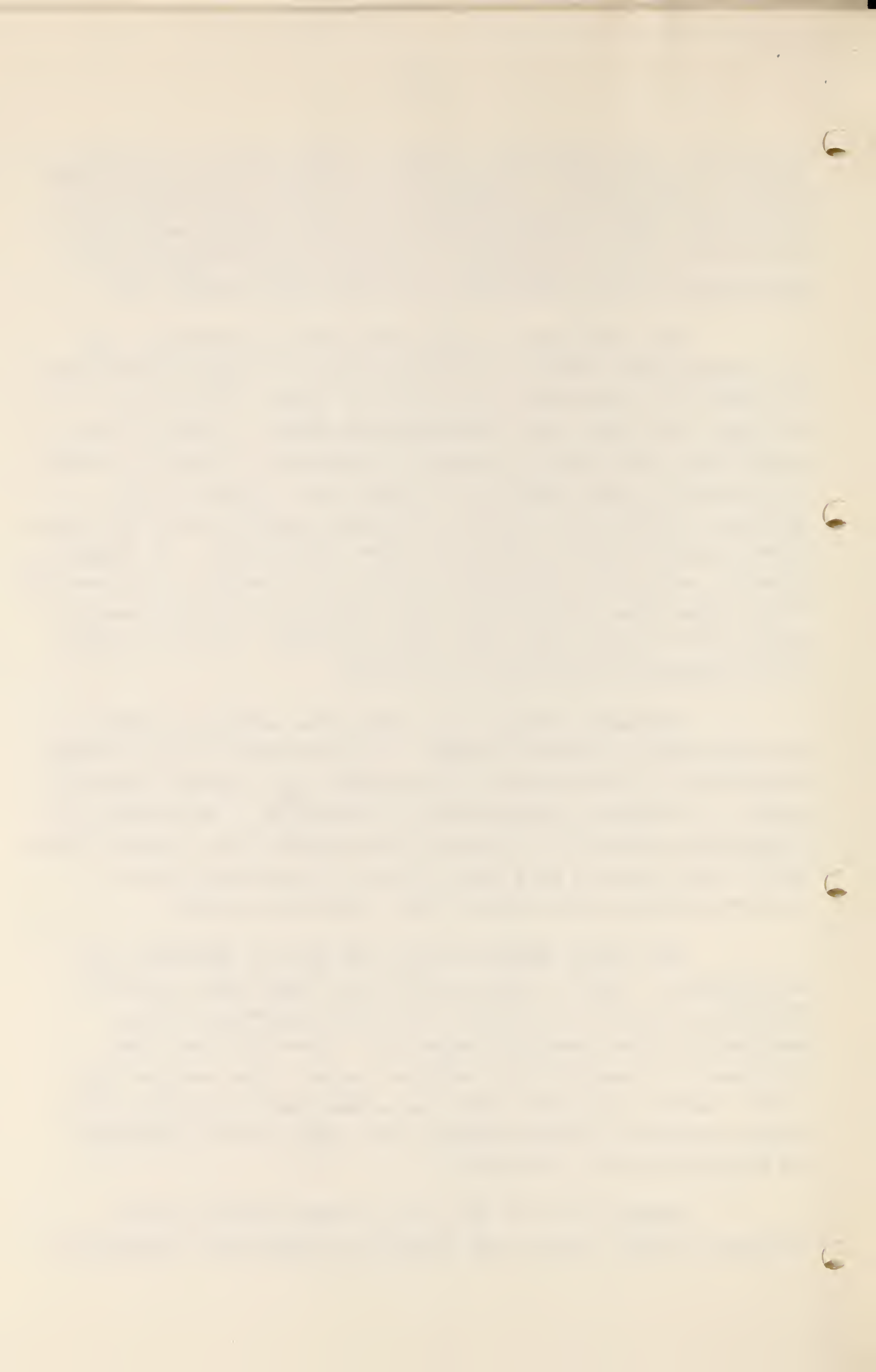
The Commission's point was that the interview was an inappropriate method of selection for the supply clerk jobs, in addition to adversely affecting Mr. Malik. It was not entirely clear what use the Commission sought to make of this contention, and Professor Stager's evidence. At least in part, such material would forestall or make more difficult the employer's burden of showing a business necessity justification, once disproportionate impact had been established. It seemed, however, as if the Commission wished to go further, and have the Board infer from the serious flaws inherent in this interview method that it must have been discriminatory. It is not open to the Board to make such an inference.

Professor Stager had little of a positive nature to say about this interview method. He stated that in an internal competition, like this one, considerably more weight should be given to on-the-job assessments of candidates. No on-the-job assessments figured in the selection process here, and Mr. Malik feels that he would have been awarded the position had his work experience prevailed over the interview results.

The rating system itself was said to possess a lot of problems. Some of the scales (e.g. Experience, Value of Knowledge Related to Position) are not independent: they measure the same domain of behaviour. Thus the scale may overreward or overpenalize certain traits. This was the case in Mr. Malik's situation when his answer about returning from coffee break was counted against him under the two headings of Reliability and Initiative.

Another flaw in the rating scale pointed out by Professor Stager was the way numerical values were assigned to





particular types of characteristics. The interviewers were required to award precisely the number assigned - i.e. 48 or 38 points - and could not assign an intermediate factor more representative of the candidates' performance. Similarly, the allowable maximum marks for each heading (i.e. Education, Experience) are fixed by The Skilled Trades Rating Manual; the interviewers were not allowed to assess which of those characteristics were more important for the particular job and thus worth more points. Expression, for example, was given a maximum total of 60 points, and education 48, although facility with oral and written English did not seem to be that important a requirement of this particular job.

In addition to the drawbacks inherent in the scale itself, Professor Stager pointed out drawbacks in the way it was used. For example, the "Reliability" criterion seems to have been intended to measure how well a person could be counted on to perform the job. These interviewers used it to measure almost exclusively candidate performance and attitudes about lateness. Moreover, Professor Stager criticised the interviewers' decision to arrive at the score for each candidate after all the interviews were over, and by way of consultation among themselves. The preferable alternative would have been for each interviewer to determine privately a score for each candidate after his particular interview, with consultation coming only at the end.

However, it should be noted that one of his conclusions, set out in a letter entered as Exhibit 40, was:

"In review, I do not believe that there is anything in the available material to indicate that there was particular discrimination against the complainants in the present case. However, any of the applicants, depending on their particular backgrounds and personalities could have been at a disadvantage given the assessment procedure which was used and the rating from on which the assessments were based."



Doubtless, the evidence of Professor Stager would be difficult to overcome if the employer here had to show a business necessity for this particular interview, which could not be met in any other way. The interview was not ideally suited to elicit the kinds of characteristics one might look for in a supply clerk for the government publications warehouse. Mrs. Deault herself admitted, in response to questions from Mr. Goldenberg, that the three interviewers might well have devised better questions, but that they simply didn't. The fact that all applicants had prior on-the-job experience makes more clear the availability, in this case, of an alternative method of assessment.

The employer here argued that the interview format was required by The Civil Service Commission. Apparently, once it has been decided that there will be a competition for a job, as was done here, the interview requirement follows. So, too, does the use of a standard method of evaluation like Exhibit 38a. The "business necessity" position of the Crown thus has two aspects. Firstly, one can focus on the particular job being offered and ask whether the use of an interview format (which is discriminatory) is a business necessity, i.e. whether it is needed to select employees with particular characteristics necessary for the job, and whether non-discriminatory alternatives are available. Secondly, one can focus on the necessity of having personnel practices in a very large employer which permit relatively inexpensive, efficient, processing of applications for the many and varied jobs which are always coming vacant. The employer did not go into this sort of argument very thoroughly. It was dealt with in part by counsel for the Commission when I asked him what sort of obligation the Ministry would be under if Mr. Malik were successful. He submitted that the Ministry would at least be under an obligation to see that the test is an appropriate selection mechanism and use other methods of evaluation "where feasible." He did not elaborate upon what considerations should bear on the assessment of feasibility.





In my view, the employer has not shown here that the interview method used was a business necessity as that concept is developed in the cases. It has not shown that the interview was particularly appropriate to elicit candidates with characteristics desired by management for the efficient and safe operation of its business. Nor, within the context of this job, have they shown that there was not available a different method to achieve the same object. It may be, to be sure, that widespread use of an interview (or any uniform) method of assessment may in general terms be a business necessity, given overall cost and efficiency considerations. Ironically, introduction of a standardized test for civil service positions has, at various times in our history, been regarded as a positive step toward achieving equality and removing favouritism.

Because, however, of my previous finding on the question of indirect discrimination, it was not necessary for the employer here to satisfy the business necessity test. I have found that the Commission has not established that the interview method had a disproportionately unfavourable impact upon a protected group of whom Mr. Malik was a member. However unpalatable the result to Mr. Malik, I do not think that the result was brought about by direct or indirect discrimination.

The Commission did not allege in this case that there was direct discrimination against Mr. Malik. They did, however, lead the evidence of Mr. Malik concerning incidents in the workplace prior to the interview period which Mr. Malik viewed as discriminatory. The first incident involved the tripping of another Pakistani employee in the lunchroom. In the second, a fellow employee slapped Mr. Malik, called him a "Paki" and made derogatory comments about the lifestyle of Pakistanis in Canada during an altercation about the time Mr. Malik arrived at work one morning. In both cases, Mr. Malik testified, he had thought that management reaction had not been firm enough. This, if I understand his testimony, shows at least tolerance of discrimination by the Respondent, if it does not go all the way toward establishing discrimination on its part. In such an atmosphere, it appears, Mr. Malik readily concluded that his not being hired had a racist cause.



This "atmospheric" evidence was not used by Counsel for the Commission to try to establish a predilection to discriminate. Indeed, it would seem from the evidence before the Board that warehouse management responded properly in the incidents cited.

Following the tripping incident, the warehouse manager Mr. Turkington composed and posted a notice affirming the Government's adherence to The Human Rights Code. Filed as Exhibit 6, the notice said in part "This warehouse is a part of that Government and as such it's [sic] employees are expected to conduct themselves in a manner consistent with what the "Code" is meant to convey."

Testimony with regard to the second incident showed that Mr. Malik had himself sworn at his offending co-worker, and that the warehouse manager had rebuked both men for their unacceptable conduct - the slap, and the profanity. In addition, the warehouse manager told the employee who had slapped Mr. Malik that a repetition of his actions would put his job in jeopardy. Mr. Malik read and confirmed the accuracy of Mr. Turkington's memo to file concerning the incident, which was later filed as Exhibit R4 at the Inquiry.

Mr. Malik was offended by some of the questions asked at his job interview, but not, according to his testimony, because they had discriminatory overtones. He felt questions about going to night school were an intrusion into his privacy. He thought he should have been asked how he did the job and whether he liked it.

There was not a full review before the Board of the on-the-job performance of all applicants; the Commission correctly did not attempt to do in this hearing what it said should have been done in the first place. Certain details of the on-the-job performance of Mr. Malik and the ninth-rated applicant did, however, emerge. In particular, on what seemed to be a key question of attitude to coffee breaks, lunches and punctuality, it seems as if the two men were relatively similar. Mr. Chandar Kohli, one co-worker, testified that both Mr. Malik and the successful applicant "goofed around" but Mr. Malik did less. Another co-worker, Lionel





Persaud, said that both "goofed off", Mr. Malik in the morning and the other man at lunch.

On the basis of the evidence, it does not seem as if wrongful discrimination - direct or indirect - played any part in the Ministry's decision not to award the job to Mr. Malik. Commission counsel argued that we should find in Mr. Malik's favour if prohibited factors played any part in the decision; it was not necessary to show that they were the sole factor involved: Ry. Bushnell Communications Ltd. et al. (1974), 4 O.R. (2d) 288 (C.A.). Although I agree with the submission as to the law, I cannot see any basis for applying it here.

Even though I find that the Respondents have not contravened any provision of the Code, some attention should be paid at this juncture to Mr. Malik's claim for damages, had he been successful. Counsel requested damages for lost wages and damages for the suffering and indignity felt by Mr. Malik.

I have no doubt that Mr. Malik's feelings were hurt and his expectations disappointed by the decision. There is evidence that his co-workers also expected, on the basis of his seniority, that he would receive a permanent position. Mr. Malik testified that not being hired really hit him hard and that he thereafter felt he would not get a good reference from the government.

A Board in a proper case does have the power to award general damages for injury to feelings. Had the Commission established its main case, I would have considered making an award of \$500 on this head. Although he did establish injury to feelings, the evidence showed that Mr. Malik's expectations regarding the interview itself were not very realistic; it also showed that those associated with the Ministry behaved in a decent and straightforward manner, even if the interview process was in this case a clumsy mechanism. Two of the nine jobs in the publications warehouse went to persons of "East Asian" origin. For these reasons, I would not find a higher award appropriate.





Mr. Malik's claim for lost wages is somewhat more involved. He claims in respect of the period April 1, 1978, following the termination of his last contract, to October 31, 1979, the first day of the hearing. At his salary with the government as of March, 1978 (\$453.44 every 2 weeks), he would have earned \$18,727.00, over this period. He actually earned \$6,948.80, \$3,000 from Unemployment Insurance received during two periods (\$1,650 in April to June of 1978 and \$1,350 in January to March of 1979) and \$3,948.80 from employment at Philco Ford assembling components for car radios from June 21, 1979 to the date of the hearing.

His claim is for the difference between what he would have earned at his old rate and what he actually earned, or \$11,783.00.

Problems with his claim for lost wages are fourfold. Firstly, the claim includes amounts in respect of the period June, 1978 to January, 1979 when Mr. Malik was outside Canada. In June of 1978 he went to Libya, staying there until the end of August, 1978. In Libya, he unsuccessfully sought employment with the Arabian Gulf Exploration Co. (Ex. 19), Mobil Oil and Oxy Oil.

From Libya, he went to Pakistan. There, he unsuccessfully sought employment in a number of capacities, including: computer engineering with International Computers Limited; the Ministry of Petroleum and Natural Resources; electrical engineering or television engineering with the Pakistan Telegraph and Telephone Department; the Pakistan Atomic Energy Commission; and engineering with The Pakistan Water and Power Development Authority. He returned to Canada in January, 1979. His reasons for seeking jobs overseas where he had family living, included his impression that he would not get a good reference from the Ontario Government, and that his job search here would be fruitless. He explained the somewhat elevated character of the positions sought by saying that he wrote general letters of application, setting out his experience and education, which included an electronic technician certificate from Centennial College. The Companies to whom he applied specified the jobs available, and may have overestimated the weight of his Canadian qualifications.



The Respondent objected to there being an award for lost wages in respect of the overseas period. Although it can only be an observation at this stage, I agree with the submission. There is not enough evidence to show that these six months constituted a bona fide search for employment; they may indeed simply have prolonged the jobless period.

Mr. Malik's job search in Canada also bears some evidence of rather optimistic expectations, given his experience and education, even including the computer course. He applied for positions with a CIDA project assisting the Water and Power Development Authority of Pakistan in construction of transmission lines and substations, a position at Canadian Pittsburgh Industries, a position with the Saudi Arabian Automatic Telephone Project of Philips Telecommunications in the Netherlands and a job with Canada World Youth, an international service organization. He also, however, registered at Manpower as an electronic technician, upon the recommendation of a counsellor there. He also went in search of warehouse jobs he saw advertised on the board at Manpower when he visited the office. On balance, I think that Mr. Malik's efforts to find employment in Canada were serious and realistic, and that had his complaint been successful he would have merited compensation for lost wages.

The duration of that compensation is however, a difficult point. He became employed, albeit at a lower rate than his government job, in June, 1979 and his lawyer asked for the difference between the old and new rates up to the date of hearing. Counsel for the respondent submitted that he should have had nothing in damages for the period after obtaining his new job.

The basis of the submission of counsel for the Commission must have been that Mr. Malik would have kept his Ontario government job if awarded it as of March 1, 1978. Yet, it was pointed out that new permanent employees of the civil service are subject to a probationary period of a year. One factor which could





cause job loss in that time is lateness; since contract employees are not paid for time missed because of lateness, but civil servants are, the government takes a keen interest in ensuring punctuality in its permanent employees.

There was nothing to show that Mr. Malik would definitely have lost his job for lateness. Yet there was enough on the record to indicate some problem in this regard. In the circumstances the doubt is sufficient reason not to accede to counsel's request that he have the difference in rates. In addition, there is no real comparison on the record of all the terms and conditions of the warehouse job and the Phillco Ford job. It may well be that the lower rate is made up for by some advantage (e.g. Union representation, paid holidays, other benefits) not available in the contract position.

To summarize, I find that the complaint of discrimination has not been established against any of the Respondents. There is an insufficient showing of disproportionate impact of the interview format on a protected group of whom Mr. Malik was a member. The generality of the expert testimony, the problems of defining the group, and the experience of the other three applicants of East Asian origin all militate against ruling in favour of the Commission and complainant.

Had there been a showing of disproportionate impact, the Respondent Ministry would have been, in my view, unable to satisfy its burden of showing the interview to be a business necessity, performing functions which could not be done in any other way.

The interview method used here was indeed a clumsy instrument, not particularly useful in matching characteristics with job requirements. Yet its frailty is not, of itself, sufficient ground for labelling it discriminatory. For a contract worker like Mr. Malik there is unfortunately no access to the disputes resolution mechanism of the regular grievance process. This is, in my view, clearly a case where access to a grievance mechanism would have been appropriate. Similarly, the protection given by seniority in a

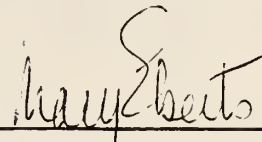


collective bargaining system would have ensured recognition of Mr. Malik's past contributions. The problem here is that to get access to any mechanism for providing redress, Mr. Malik had to show wrongful discrimination. On the facts, this was just not possible.

Lastly, the complaint as amended was against the Ministry and three individual employees thereof. Even had I found a sufficient showing of disproportionate impact, I would have held that the complaint was established only against the Ministry. Disproportionate impact, and failure of the business necessity defence, would properly in these circumstances have been regarded solely as the responsibility of the "institutional" respondent. The individuals, although they framed the particular questions and made the ultimate decision, were doing so within requirements which did not give them much freedom to influence the outcome. Theirs was not the decision to require the interview as the sole method of evaluation. Nor was there any allegation of improper attitude or behaviour, along discriminatory lines, on their part as individuals.

Accordingly, this Board orders that the complaint be and the same is hereby dismissed. The formal order of the Board is affixed hereto.

Dated at Toronto this 26th day of February, 1981.

  
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Mary Eberts  
Board of Inquiry



IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE  
R.S.O. 1970, c. 318, as amended,

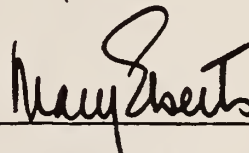
AND IN THE MATTER OF the complaint of Mr. Nadim Altaf Malik against Her Majesty the Queen in Right of Ontario acting through Her servants and agents in the Ministry of Government Services, and the following servants or agents personally, John Noble Turkington, Christine Deault and D'Arcy Counsell.

O R D E R

UPON reading the complaint of Mr. Nadim Altaf Malik, upon hearing the evidence and considering the exhibits herein, and upon hearing Counsel for the Ontario Human Rights Commission and the complainant, and counsel for the Respondents,

IT IS ORDERED that the complaint be and the same is hereby dismissed.

DATED at Toronto, this 25th day of February, 1981.



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Mary Eberts, Board of Inquiry



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